

**Before the
Federal Communications Commission
Washington, D.C. 20554**

Rates for Interstate Inmate Calling Services

WC Docket No. 12-375

**SECURUS TECHNOLOGIES, INC.
PETITION FOR PARTIAL STAY OF SECOND REPORT AND ORDER
PENDING APPEAL
(FCC 15-136)
PUBLIC VERSION**

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Dated: December 22, 2015

SUMMARY

Securus respectfully seeks a partial stay of the *Second Inmate Rate Order* and demonstrates herein that its request meets all four criteria of the *Virginia Petroleum Jobbers* test. Due to the upcoming implementation deadline, asks the Commission to resolve this Petition by **January 15, 2016**.

First, Securus is likely to prevail on the merits of its appeal of these portions of *Second Inmate Rate Order*:

- It grossly oversteps the Commission's jurisdiction by purporting to regulate financial transaction fees and video-based services.
- It adopts financial transaction fees and caps for "Single-Call Services" that are below Securus's demonstrated costs of service.
- It adopts a definition of "site commission" that is vague, overbroad, and could lead to further extrajurisdictional regulation by the FCC.

Secondly, Securus will suffer irreparable and immediate harm if the *Second Inmate Rate Order* becomes effective which is described in detail in the sworn affidavits of its Chief Executive Officer Richard A. Smith (dated Dec. 21, 2015), and Chief Financial Officer Geoffrey M. Boyd (dated Dec. 18, 2015). Securus will lose tens of millions of dollars in both up-front, sunk investments and lost revenue. The ability of Securus to satisfy its obligations to its banks would come into question. The likelihood and degree of harm facing Securus warrants a stay.

Third, a stay of the *Second Inmate Rate Order* will not materially harm third parties. With regard to online credit card transactions, Securus customers always have had the option of paying by check or money order, or via live agent. Retaining the current transaction rates will thus not prevent people from timely paying and funding their accounts. Similarly, persons who have no need to use Text2Connect or PayNow will be wholly unaffected if the current rates remain in place for those services. And imposing a partial stay of the reporting requirements in

Rule 64.6060 will be undetectable to third parties, for the usefulness of that rule lies with FCC Staff and not the general public.

Fourth, and somewhat to the converse of the foregoing, the public interest will actually be *harm****ed*** if the requested stay is not granted. The significant, unrecoverable financial losses that Securus will incur under the new caps for credit card transactions and “Single-Call Services” likely will force Securus to stop enabling online credit card transactions and to cease providing Text2Connect and PayNow calling services. As Mr. Smith explains, these services are vitally necessary to inmates and detainees – they “keep people safe,” in his words.

Under Commission precedent, a petitioner need not make a strong showing as to every prong of *Virginia Petroleum Jobbers* in order to obtain a stay. Here, however, Securus has amply satisfied each prong and demonstrated that a stay is not only appropriate, but necessary.

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ATTACHMENTS	Affidavit of Richard A. Smith, Chief Executive Officer, Securus Technologies, Inc. (Dec. 21, 2015) (PUBLIC VERSION)
	Affidavit of Geoffrey M. Boyd, Chief Financial Officer, Securus Technologies, Inc. (Dec. 18, 2015) (PUBLIC VERSION)
	Affidavit of Danny DeHoyos, Senior Vice President – Operations, Securus Technologies, Inc. (Dec. 22, 2015)

Securus Technologies, Inc. (“Securus”), through counsel and pursuant to 47 C.F.R. § 1.43, hereby files this Petition for Partial Stay of the order titled *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Second Report and Order and Third Further Notice of Proposed Rulemaking, FCC 15-136 (rel. Nov. 5, 2015), published at 80 Fed. Reg. 79136 (Dec. 18, 2015) (“*Second Inmate Rate Order*” and “*Third FNPRM*”). Specifically, Securus requests a stay of newly-amended regulations Rules 64.6020 (Ancillary Service Charge), 64.6060(a)(3) and (4) (Site Commission and video visitation services reporting requirements), 64.6080 (Per-Call or Per-Connection Charges), 64.6090 (Flat-Rate Calling), and 64.6100 (Minimum and Maximum Prepaid Calling Account Balances). Because the rates and rules adopted in the *Second Inmate Rate Order* will become effective very soon, Securus respectfully requests that the Commission resolve this Petition by **January 15, 2016**.

STANDARD FOR ENTERING A STAY

The Commission applies the four-part test in *Virginia Petroleum Jobbers Association* when reviewing petitions for stay pending appeal.¹ That test is: (1) petitioner is likely to prevail on the merits of its appeal; (2) petitioner will suffer irreparable harm absent a stay; (3) other interested parties will not be harmed by entry of a stay; and (4) the public interest favors a stay.² The Commission does not always accord each prong of this test equal weight: “If there is a particularly overwhelming showing in at least one of the factors, the Commission may find that a

¹ E.g., *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Order, 23 FCC Rcd. 1705, 1706 ¶ 4 (2008) (citing *Virginia Petroleum Jobbers Ass’n v. Federal Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (granting petition for stay); *Charter Commc’ns Entm’t I, LLC*, Memorandum Opinion and Order, 22 FCC Rcd. 13890, 13892 ¶ 4 (2007) (staying orders setting cable rates); *Comcast Cable Commc’ns, LLC*, File No. CSB-A-0741, Order, 20 FCC Rcd. 8217 ¶ 2 (2005) (citing same) (staying several orders that set local cable rates).

² *TRS Services*, 23 FCC Rcd. at 1706 ¶ 2; *Comcast Cable*, 20 FCC Rcd. 8217 ¶ 2.

stay is warranted notwithstanding the absence of another one of the factors.”³ For example, “[i]f the petitioner makes a strong showing of likely success on the merits, it need not make a strong showing of irreparable injury.”⁴

BACKGROUND

On October 22, 2015, at its October Open Meeting, the Commission voted to adopt new rate caps and regulations for inmate telecommunications services by a 3-2 vote. On November 5, 2015, the Commission released the *Second Inmate Rate Order* which includes rate caps for local, intrastate, and interstate Inmate Calling Services (“ICS”), as well as for transaction fees and ancillary services. The new rates and rules that are the subject of this Petition are:

1. Ancillary Service Charges and Related Pricing Rules (Rules 64.6020, 64.6080, 64.6090, 64.6100)

The *Second Inmate Rate Order* sets “Ancillary Service Charge” caps in Rule 64.6020 for items that include credit-card processing, which is a financial transaction, and premium, optional calling services which the FCC calls “Single-Call” services”. The caps are:

Automated Credit Card Processing	\$3.00
Live Agent Credit Card Processing	\$5.95
Single-Call Services	Financial transaction fee plus applicable calling rate

This rule marks the first instance in which the FCC has attempted to regulate financial fees in ICS. Securus has objected consistently to the FCC’s regulation of these fees on the ground that the Communications Act does not confer to the FCC jurisdiction, let alone authority, over financial transactions.

³ *TRS Services*, 23 FCC Rcd. at 1707 ¶ 4.

⁴ *Charter Commc’ns*, 22 FCC Rcd. at 13892 ¶ 4.

As the Commission is aware, Securus provides Text2Connect and PayNow which are optional, premium calling options.⁵ Text2Connect enables inmates to place collect calls to wireless phones, and PayNow enables inmates to place collect calls to landline phones which are paid by the called party immediately in real time via credit card. These services are recent innovations in the ICS industry and give inmates an immediate connection to friends and loved ones. Both services require the assistance of a third-party vendor which charges Securus for each call transaction.

The new rules include caps for “Single-Call Services”: carriers may pass through only “the exact transaction fee charged by the third-party provider, with no markup, plus the adopted, per-minute rate.” Rule 64.6020(b)(2). Further, Rules 64.6080 and 64.6090 prohibit per-call charges and flat-rate charges for inmate calls, and therefore make unlawful the existing flat-rate billing mechanisms used for these two services. Finally, Rule 64.6100 regulates the minimum and maximum amounts that an ICS provider must permit a customer to deposit into a prepaid account, for the stated purpose of limiting the ancillary charges imposed for such deposits.

2. Reporting Requirements, Including for Site Commissions (Rules 64.6000 and 64.6060)

ICS providers must submit annual, certified reports to the FCC that disclose, on a fairly detailed basis, several items including all calling rates imposed in the preceding calendar year, the amount of all ancillary and transaction fees that were charged, minutes of use for video visitation services, and “the Monthly amount of each Site Commission paid.” Rule 64.6060(a).

The term “Site Commission” is defined as

any form of monetary payment, in-kind payment, gift, exchange of

⁵ WC Docket No. 12-375, Comments of Securus Technologies, Inc. at 27-28 (Jan. 12, 2015); Letter from Stephanie A. Joyce, Counsel to Securus, to Chairman Tom Wheeler, *et al.* at 5 (Oct 6, 2014); *see also Third FNPRM* n.1122.

services or goods, fee, technology allowance, or product that a Provider of Inmate Calling Services or affiliate of an Provider of Inmate Calling Services may pay, give, donate, or otherwise provide to an entity that operates a correctional institution, an entity with which the Provider of Inmate Calling Services enters into an agreement to provide ICS, a governmental agency that oversees a correctional facility, the city, county, or state where a facility is located, or an agent of any such facility.

Rule 64.6000(t).

ARGUMENT

I. SECURUS IS LIKELY TO PREVAIL IN ITS PARTIAL APPEAL OF THE SECOND INMATE RATE ORDER

The first prong that the Commission considers in determining whether to stay the effectiveness of new regulations during the pendency of the appeal is the likelihood of success on the merits.⁶ The portions of the *Second Inmate Rate Order* which Securus intends to challenge are likely to be reversed on appeal, thus satisfying this criterion.

A court of appeals reviewing the Commission's action in the *Second Inmate Rate Order* will evaluate Commission action under the strictures of 5 U.S.C. § 706 which states, in pertinent part:

... The reviewing court shall –

- (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;

⁶ *TRS Services*, 23 FCC Rcd. at 1706 ¶ 4; *Comcast Cable*, 20 FCC Rcd. 8217 ¶ 2.

- (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
- (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

As demonstrated herein, the *Second Inmate Rate Order* is likely to be found unlawful pursuant to subsections (A), (C), (D) and (E).

A. The FCC’s Rules Restricting So-Called “Ancillary Service Charges” Are Unlawful

The *Second Inmate Rate Order* asserts sweeping authority over so-called “ancillary service charges” billed by some ICS providers. In particular, Rule 64.6020(a) prohibits the charging of *any* “Ancillary Service Charge” unless specifically permitted by rule 64.6000; and rule 64.6020(b) imposes fixed, permanent price ceilings on those charges that are permitted. Rule 64.6000(a) defines “Ancillary Service Charge” as “any charge Consumers may be assess[ed] for the use of Inmate Calling services that are not included in the per-minute charges assessed for individual calls.” It then lists the five permitted types of such charges: Automated Payment Fees, Fees for Single-Call and Related Services, Live Agent Fee, Paper Bill/Statement Fees, and Third-Party Financial Transaction Fees. Also, Rule 64.6100 works in tandem with the Ancillary Service Charges rules by imposing minimum and maximum transaction limits on prepaid and debit accounts, for the express purpose of limiting the ability of providers to collect fees for replenishing these accounts. *Order ¶¶ 175-178.*

These rules are likely to be vacated on judicial review, because they exceed the FCC’s jurisdiction by regulating financial transactions rather than communications services; they prevent ICS providers from recovering their costs, including a return on investment, on the services that are permitted by the rules; they unreasonably prevent ICS providers from offering

any optional service or feature not specified in the rules; and they are otherwise arbitrary and capricious as detailed below.

First, the FCC lacks statutory authority to set rates or prohibit charging for financial transactions. The FCC’s authority under Title II of the Act generally, and under Section 276 specifically, is limited to communications services. It is axiomatic that the FCC cannot adopt any rules unless authorized to do so by Congress, because it “literally has no power to act, ... unless and until Congress confers power upon it.” *La. Pub. Serv. Comm’n v. FCC*, 476 US 355, 374 (1986). That power must be found in “the language of the statute enacted by Congress. ... [Courts] will not alter the text in order to satisfy the policy preferences” of an administrative agency. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002).

The FCC contends that its assertion of jurisdiction is justified by Section 201 of the Act as to interstate services, *Order* ¶ 194, and by Section 276 as to intrastate services, *id.* ¶ 196. The FCC also relies upon the *undefined* term “ancillary services” in the statutory definition of “payphone services,” 47 U.S.C. § 276(d), as justifying its action here. Securus does not dispute that these provisions confer the FCC authority over all *communications* services offered by common carriers, including those ancillary to the basic service of completing a telephone call, but neither of them empowers it to extend its authority to financial transactions such as credit card processing fees, billing statement fees, and other charges relating to funding of a payment account rather than charges for a particular call.

The structure of the “payphone services” definition as well as the overall statutory scheme both require that the term “ancillary” be interpreted in a limited sense. The U.S. Supreme Court has cautioned that interpretation of a statute must “avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving ‘unintended

breadth to the Acts of Congress.’” *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (quoting *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961)). A statutory interpretation must be based upon “the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). “A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme ... because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.” *United Sav. Ass’n. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988).

Here, sections 1 and 2 of the Act provide the “broader context” within which sections 201 and 276 must be considered. Section 1 declares that the purposes of the Act include “to make available ... a rapid, efficient, Nation-wide and world-wide wire and radio *communication service* with adequate facilities at reasonable charges” 47 U.S.C. § 151 (emphasis added). Section 2(a) specifies that the provisions of the Act apply to “communication by wire or radio” 47 U.S.C. § 152(a). In short, the purpose of the Act is to regulate communications, not to regulate financial transactions or sales of other goods or services. Indeed, the accepted standard for the FCC’s exercise of ancillary jurisdiction under Section 4(i) of the Act, 47 U.S.C. § 154(i), is a two-prong test under which the *first* prong is that the “the Commission’s general jurisdictional grant under Title I [of the Act] covers the regulated subject[.]” *American Library Ass’n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005) (vacating broadcast flag rules as outside the Commission’s authority); *accord, Comcast v. FCC*, 600 F.3d 642, 650 (D.C. Cir. 2010) (rejecting assertion of “ancillary” jurisdiction).

American Library Ass’n is particularly instructive in this context, because the FCC justification that the court of appeals rejected was strikingly similar to that found here:

The Commission’s general jurisdictional grant under Title I plainly encompasses the regulation of apparatus that can receive television broadcast content, but only while those apparatus are engaged in the process of receiving a television broadcast. Title I does not authorize the Commission to regulate receiver apparatus after a transmission is complete. As a result, the FCC's purported exercise of ancillary authority founders on the first condition. There is no statutory foundation for the broadcast flag rules, and consequently the rules are ancillary to nothing.

406 F.3d at 692. Similarly, the Commission has authority to regulate, for example, the amount that can be withdrawn from a prepaid account in connection with a particular call, but that does not mean that it can regulate all transactions into and out of that account after the call is complete.

Further, section 276(b)(1)(A) specifies that any compensation plan adopted by the FCC must ensure that providers “are fairly compensated for *each and every completed intrastate and interstate call ...*.”⁷ The FCC itself cites this sentence as supporting the broad sweep of its rules, *Order* ¶ 195, but offers no explanation of its reasoning. In fact, the only reasonable interpretation of this passage is that it gives the FCC authority over charges for “call[s],” not charges for anything separate and apart from a call. “Ancillary services” in section 276(d), therefore, must be construed as meaning *communications* services that are ancillary to the completion of interstate and intrastate ICS *calls*.

Because the Commission’s rules Ancillary Service Charges fail to distinguish between communications and non-communications services, and prohibit all unspecified charges indiscriminately, they are very vulnerable to reversal and should be stayed.

⁷ 47 U.S.C. § 276(b)(1)(A) (emphasis added).

Second, even assuming that it acted within its jurisdiction, the FCC arbitrarily and capriciously set rate caps that are below the reasonable costs of providing certain ancillary services.

The FCC authorized a maximum Automated Payment Fee of \$3.00 per use, for processing a credit card or debit card payment, among other things. Rules 64.6000(a)(1), 64.6020(b)(1). Undisputed evidence submitted by Securus, however, showed that the cost to the company of processing credit card payments is considerably higher than \$3.00:

- Up to **CONFIDENTIAL** ** **, depending on volume, charged by the vendors that perform the credit card processing;
- Bad debt chargebacks averaging **CONFIDENTIAL** ** ** per transaction;
- An average of **CONFIDENTIAL** ** ** per transaction for internal labor, specialized software, IT operations expense, testing/QA expense, Product Manager expense, network operations expense, accounting expense, reconciliation expense, accounts payable expense, auditor expense, reporting expense, SG&A, and overhead attributable to transaction processing.⁸

For payment processing by a live agent, the FCC allows only a fee of \$5.95 per transaction. Rules 64.6000(a)(3), 64.6020(b)(3). This cap is still below than the cost that Securus reported for *automated* payment processing, without even allowing for the additional payroll, benefits, and overhead costs (*e.g.*, providing a place for the agents to work) associated with live agent services.

⁸ WC Docket No. 12-375, Declaration of Dennis Rose (Public Version) (filed Jan. 12, 2015).

It is well-settled that “[p]rice control is ‘unconstitutional ... if arbitrary [or] discriminatory.’”⁹ Courts reviewing agency ratemaking decisions focus on whether the regulated rates permit the entity to obtain a return on its investment “sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.”¹⁰ Rates that are below the direct cost of service, by definition, cannot provide any return on investment and therefore cannot be just and reasonable.

To be sure, the FCC contends that it set these ancillary service charges based upon an analysis of the results of its mandatory data collection, in which ICS providers reported their costs. *Order* ¶¶ 167-168. Nonetheless, the FCC adopted precisely the levels of charges that were proposed by one provider, Pay Tel.¹¹ The fact that the FCC made no adjustments to Pay Tel’s proposed rate ceilings suggests that its cost analysis was cursory, at best.

Third, the FCC completely prohibited charging customers for processing account deposits transmitted by third-party money transfer services (*e.g.*, Western Union and MoneyGram). The FCC found that any money transfer charge imposed by a third party was not within the scope of Section 276, and therefore could be passed through to consumers. *Order* ¶ 170. However, it determined that ICS providers could not charge *any* additional fee, no matter how modest, for processing these incoming transfers and depositing funds into the consumer’s account. *Id.* ¶ 171. If an ICS provider incurs *any cost at all* to accept such money transfers, this rule will prohibit it from recovering that cost from its customers.

⁹ *Permian Basin Area Rate Cases*, 390 U.S. 747, 769-770 (1968) (quoting *Nebbia v. People of State of New York*, 291 U.S. 502, 539 (1934)).

¹⁰ *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 602 (1944).

¹¹ WC Docket No. 12-375, Letter from Marcus W. Trathen, Counsel to Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, Attachment (filed Jan. 28, 2014).

Although the FCC claimed that ICS providers had failed to explain what functions they performed in connection with processing incoming money transfers, *id.*, it had received extensive cost submissions from these providers as a result of its data collection, and apparently failed to make the slightest effort to review these submissions to identify relevant costs. It is simply irrational to assume that providers can ensure that incoming money transfers are correctly credited to the appropriate consumer's account without incurring any cost at all, either for equipment and software to handle these transactions or for human personnel to review them and ensure accuracy.¹²

The FCC has previously recognized that the just and reasonable rate standard requires that providers have an opportunity to recover transaction costs, along with other reasonable operating costs. *E.g., Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, 5 FCC Rcd. 7507, 7532 ¶ 213 (1990) (“It is well established that rate of return prescription under the ‘just and reasonable’ standard requires a balancing of ratepayer and shareholder interests. The regulated company must be allowed the opportunity to earn a return that is high enough to maintain the financial integrity of the company and to attract new capital to the business.”); *Requests for Waiver of Various Petitioners to Allow the Establishment of 700 MHz Interoperable Public Safety Wireless Broadband Networks*, Order, 25 FCC Rcd. 5145, 5154 ¶ 30 (2010) (“We recognize that the PSST will incur limited but legitimate transaction costs in preparing and executing these leases, which we conclude they should be

¹² Alternatively, it is possible that the FCC believed that providers *do incur* some additional costs to perform these functions, but intended that those costs be recovered through the per-minute call charges imposed on all ICS users. In that event, the *Order* would still be arbitrary and capricious, because it offered no explanation of why the costs of providing optional services should be borne in part by users who do not use those options.

allowed to recover.”). The Commission’s failure to allow similar recovery in this case is contrary to its own precedent, as well as arbitrary and capricious on its face.

Further, the FCC’s refusal to permit carriers to recover transaction costs and a return on capital in connection with third-party money transfers is inconsistent with its treatment of other costs in this proceeding. The FCC has recognized that calling rates must have profit built into them. The discussion of basic calling rates throughout the *Order* repeatedly expresses the Commission’s intent to set rates that allow for a reasonable level of profit. *See, e.g., Order* ¶¶ 47, 49 (“a fair profit”), 53, 56, 58, 61, 66, 114; *see also First Inmate Rate Order* ¶ 61 (“the costs of providing interstate ICS ... include fair compensation (including a reasonable profit) ...”). Yet, when it comes to charges for financial transactions, the FCC is perfectly willing to prohibit providers from earning any profit, regardless of what investments they have made to add the capability to handle these transactions. It is arbitrary to treat financial transactions differently now that the FCC has determined that it can regulate them as part of ICS. *Time Warner Entm’t Co., LP, v. FCC*, 56 F.3d 151, 173-74 (D.C. Cir. 1995) (reversing, in part, FCC orders implementing Cable Television Consumer Protection and Competition Act of 1992 for failing to allow a meaningful opportunity for recovery of external costs).

Fourth, the FCC’s blanket prohibition on all ancillary service charges not specifically authorized is arbitrary and capricious, in that it prevents the development and introduction of any new services in the future, as discussed further in the following section.

B. The FCC’s Rules Prohibiting Recovery of Costs of Premium Calling Services Are Arbitrary and Capricious

The FCC also adopted a rule that prohibits carriers from charging more than the usual calling rate for premium billing options, which the *Order* and rules refer to as “single-call and related services,” except for a pass-through (without markup) of third-party transaction fees.

Order ¶¶ 182-189; Rule 64.6000(a)(2), 64.6020(b)(2). These services “are billing arrangements whereby an ICS provider’s collect calls are billed through third-party billing entities on a call-by-call basis to parties whose carriers do not bill collect calls.” *Order* ¶ 182. This somewhat circular description, and the fact that the FCC erroneously included these services in the “Ancillary Service Charge” rules, demonstrates how little attention the FCC gave the record relating to these services.

Traditionally, collect calling has only been available to landline telephones, which are used by a declining percentage of the population. Most inmate calls now are charged against prepaid accounts, rather than being made as collect calls; but there are some situations, especially after an individual has been arrested and they or their contacts have not yet established a prepaid account, when some other billing option is essential. Securus therefore developed two optional services that permit the convenience of a collect call without requiring the recipient of the call to have a landline phone. One, Text2Connect enables an inmate to place a collect call to a wireless phone, using a third-party billing agent to place a charge on the recipient’s wireless bill. The other, PayNow, enables an inmate to place a call to a person with whom Securus does not have an established billing relationship, and allows the recipient to charge the call to a credit or debit card account. This service also relies on a third-party billing vendor. As Securus explained to the FCC, these are not “ancillary” services; they are optional billing methods for completion of a basic telephone call.¹³ If these options were not available to inmates, they would be unable to place any telephone calls at all to non-landline telephones until their family members or other contacts had established and funded a prepaid account with Securus. These services therefore provide a basic calling option themselves, and are not ancillary to any other service.

¹³ Securus January 12 Comments at 27-28.

In any event, although the FCC acknowledged that “some efficiencies may derive from” these services, it also cited concerns about the rates being charged, and about end-user “confusion” about these services. *Order* ¶ 182. It ignored all evidence about the costs of providing these services and the benefits to consumers, and instead adopted a rule which arbitrarily limits the prices for single-call services to the maximum per-minute rate allowed for any other call, plus a pass-through of third-party transactions fees, without any markup. *Order* ¶ 187; Rule 64.6020(b)(2).

The Commission also ignored Securus’s explanation that called parties must approve, very specifically, the charges applicable to Text2Connect and PayNow calls: “In every case, the customer is quoted the applicable rate and must positively accept the charges before the call is completed; they may terminate the call before completion without the application of any fees.”¹⁴ Securus files with this Petition the Affidavit of Danny DeHoyos, Senior Vice President – Operations of Securus (dated Dec. 22, 2015), which recites the audible disclosures that every called party hears when an inmate attempts to call them via Text2Connect or PayNow. The disclosures include:

- “Press 1 to consent to the delivery of a pre-recorded message with information how you can arrange to receive calls from your incarcerated loved one. Press 2 or hang up to terminate this call.”
- “If you would like to continue this call of up to <effective call duration for PayNow> by accepting a charge to your mobile telephone bill of fourteen dollars and ninety-nine cents, please press one.”
- “If you would like to continue this call of up to <effective call duration for Text2Connect> by accepting a charge to your mobile telephone bill of nine dollars and ninety-nine cents, please press two.”
- “If you would like to set up or add funds to a prepaid AdvanceConnect account in order to pay for future calls, please press three.”

¹⁴ Securus October 6, 2014 Letter at 5.

DeHoyos Aff. ¶ 4.¹⁵

Even assuming *arguendo* that the record established a need for the FCC to impose some ceiling on rates for single-call services, the “no mark-up” rule it actually adopted was arbitrary and capricious. Securus provided sworn testimony that it invested approximately **CONFIDENTIAL ** **** to develop the software and billing arrangements necessary to offer these services;¹⁶ in total, Securus’s investment was “over **CONFIDENTIAL ** ** Million**” for Text2Connect and PayNow.¹⁷ The FCC’s rule deprives Securus of any opportunity to recover these costs that it has already incurred, as well as internal operating costs that it incurs on an incremental basis when it offers these service options. Even if Securus were to stop offering Text2Call and PayNow services entirely, so that it would not incur any further costs going forward, it would still be unable to recover the money it has already invested in developing these services. Conversely, if it continues to offer the services, it cannot charge prices that allow it to recover either the sunk costs or the incremental operating expenses, but must charge prices that are only sufficient to cover the cost of the basic prepaid service. Either way, the FCC rule is arbitrary and capricious for the same reasons discussed above in connection with the no markup rule for financial transaction fees. *Time Warner Entm’t Co., LP, v. FCC*, 56 F.3d 151, 173-74 (D.C. Cir. 1995).

Further, the prohibition of cost recovery will deter ICS providers from investing in developing any new, innovative optional services, whether deemed “basic” or “ancillary” by the FCC. There is no point in incurring costs to develop, deploy, or provide any new service, if the

¹⁵ Optional, convenient payment methods often carry fees. Chase bank, for example, charges \$14.95 for after-hours credit card payments. See <http://www.kiplinger.com/article/credit/T016-C000-S002-fast-ways-to-pay-your-credit-card-bill.html>.

¹⁶ Rose Decl. ¶ 4 (Public Version).

¹⁷ Boyd Aff. ¶ 7 (Public Version).

FCC will not permit recovery of those costs. This result is contrary to the stated policy of the Commission, and of Congress. In its 2013 Report and Order, the FCC stated, “we believe that our reforms will not impact security or innovation in the ICS market. ... We encourage continued innovation and efficiencies to improve the quality of service for ICS.” WC Docket No. 12-375, First Report and Order, FCC 13-113 ¶ 71 (rel. Sept. 26, 2013); *see also* WC Docket No. 12-375, Order Denying Petitions for Stay and Petition for Abeyance, DA 13-2236 ¶ 56 (rel. Nov. 21, 2013). Indeed, Section 7 of the Communications Act declares that “[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public.” 47 U.S.C. § 157(a). The rules prohibiting any profit on services involving third-party financial transactions, as well as the rule prohibiting the introduction of any new Ancillary Service Charge, both have the inevitable effect of discouraging if not absolutely prohibiting the introduction of new services. The *Order* fails to justify this deviation from the agency’s stated policy, as well as from the declared policy of Congress, and therefore is arbitrary and capricious.

The FCC may argue that it has not entirely precluded the introduction of new services by ICS providers, because a provider may petition the agency for either a waiver of the rules or an amendment to the rules to permit a new Ancillary Service Charge. This argument makes no difference, because the imposition of such a procedural hurdle to the introduction of new services is itself inconsistent with the FCC’s stated policy and with Section 7. The requirement to petition the FCC before introducing any new service would act as a tremendous disincentive to investing in the development of such services, because of (a) the considerable expense and delay involved in the agency process, which would significantly reduce the potential return on that investment, (b) the risk of rejection of the petition, which investors would factor in to estimates of the potential return, leading them to demand above-market returns on their capital,

and (c) the reality that any such petition would have to provide a fairly detailed explanation of what the new service is and how it would be offered, which would become available to the petitioner's competitors, thereby destroying any competitive advantage that the petitioner might have hoped to gain by being the first to offer a new service capability.

Accordingly, the FCC's rules prohibiting carriers from imposing any charge or recovering any additional cost they incur by providing an optional form of billing or payment for calls placed by inmates are likely to be vacated on appeal.

C. The Commission's Definition of "Site Commissions" Is Fatally Vague and Overly Broad

The Commission now has adopted a definition of "site commission" that is vague, undoubtedly overbroad, and as such attempts to regulate correctional facility operations which plainly are outside the reach of the Communications Act. The *Second Inmate Rate Order* contains the following definition in Rule 64.6000:

t. Site Commission means any form of monetary payment, in-kind payment, gift, exchange of services or goods, fee, technology allowance, or product that a Provider of Inmate Calling Services or affiliate of an Provider of Inmate Calling Services may pay, give, donate, or otherwise provide to an entity that operates a correctional institution, an entity with which the Provider of Inmate Calling Services enters into an agreement to provide ICS, a governmental agency that oversees a correctional facility, the city, county, or state where a facility is located, or an agent of any such facility.

This definition has immediate effect, because the *Second Inmate Rate Order* also adopts this reporting requirement:

- (a) Providers must submit a report to the Commission, by April 1st of each year, regarding interstate, intrastate, and international Inmate Calling Services for the prior calendar year. The report shall be categorized both by facility type and size and shall contain:

* * *

(3) The Monthly amount of each Site Commission paid;

* * *

- (b) An officer or director of the reporting Provider must certify that the reported information and data are accurate and complete to the best of his or her knowledge, information, and belief.

Rule 64.6060.

1. The definition of “Site Commission” is fatally vague.

FCC regulations that are vague will be vacated on the ground that regulated entities are deprived of notice with regard to what conduct will be deemed unlawful. *Salzer v. FCC*, 778 F.2d 869, 875-76 (D.C. Cir. 1985) (vacating denial of low-power television licenses). Here, the definition of “site commission” contains such a variegated assortment of items – payment, service, good, fee, or product – all preceded with the modifier “*any form*”, such that the FCC has made it impossible to tell what is a site commission and what is not. Securus must wonder whether every item and effort it gives to a correctional facility is a site commission; if not, what can Securus exclude?

As part of its contracts with correctional facilities, Securus installs equipment in the facilities (including telephone sets, wiring, and necessary recording equipment) and sends its employees to do work inside the facilities (such as installing and repairing equipment and training officers to use the system). Based on the FCC definition, these essential items functions, without which inmate calling could not be provided at all, could be deemed to be providing the correctional facility with the use of “goods” (*e.g.*, telephone sets and inside wire) and with “services” (*e.g.*, installation and repair) that would have to be reported as site commissions, meaning that a substantial portion of the basic cost of providing inmate calling would be reclassified as “profit” in the FCC’s eyes.

Being unable to discern, after much consideration, what the definition of “site commission” covers, Securus is likewise unable to know how to comply with the reporting obligation in Rule 64.6060. An innocent omission may lead to FCC sanctions. Over-inclusion would burden Securus needlessly. The definition is thus likely to be vacated or reversed under *Salzer*. For these reasons, the definition and the reporting requirement should be stayed pending appellate review.

2. The definition of “Site Commission” is overly broad.

The other side of the vagueness coin is that “site commission” has been drawn far too broadly by the FCC. Because it seems to cover all “services”, “goods”, and “products”, the definition strays into the authority of correctional facilities which are entrusted by statute to operate jails and prisons safely and efficiently. If Securus deploys any technology or equipment to enhance security, as requested by a facility, if that enhancement is not absolutely essential to provision of inmate calling, the FCC definition would appear to treat it as a service provided to the facility, and therefore a “site commission.”

Securus warned of this problem during the proceeding, when it cautioned the FCC to define “site commissions” as “cash payments”¹⁸ and that the new rules should not “micromanage the technological evolution of ICS service and the technological choices of correctional facilities.”¹⁹ Securus also has long argued, throughout this whole proceeding, that “[t]he

¹⁸ WC Docket No. 12-375, Letter from Stephanie A. Joyce, Counsel to Securus, to Marlene H. Dortch, FCC, at 1 (July 6, 2015) (providing notice of *ex parte* meeting with several staffpersons in the Wireline Competition Bureau).

¹⁹ WC Docket No. 12-375, *Ex Parte* Submission of Securus Technologies, Inc. at 1 (July 27, 2015).

security-related choices that correctional facilities make for inmate telephone calls are inarguably at the core of their statutory mandate to operate jails and prisons.”²⁰

By naming “any form of ... services or goods ... product” as a “site commission” that must be reported – and possibly regulated later²¹ – the FCC has placed a regulatory burden on the choices of service, feature, and capability that correctional facilities want for ICS. As such, and due to the definition’s overbreadth, the FCC is unlawfully attempting to regulate prisons operations. That action would of course be unlawful, and thus Securus’s challenge of this definition is likely to succeed on the merits. For this additional, independent reason, the definition of “site commission” and Rule 64.6060 should be stayed while Securus seeks review of this issue.

D. The Commission Has No Jurisdiction to Impose Requirements of Any Kind on Video Services

The Commission added video visitation services to the reporting requirement in Rule 64.6060 in flagrant excess of its statutory authority and without notice. Securus is likely to obtain reversal of that requirement as well.

The FCC lacks authority to impose regulations of any kind on Securus’s video services. Reporting requirements are a form of regulation. *See, e.g., Celco Partnership v. FCC*, 357 F.3d 88, 101-102 (D.C. Cir. 2004) (retention of FCC reporting requirements for wireless carriers was

²⁰ Securus January 12 Comments at 13 (citing WC Docket No. 12-375, Comments of Securus Technologies, Inc. at 11-12 (Dec. 20, 2013) (citing, *inter alia*, *McGuire v. Ameritech Services, Inc.*, 253 F. Supp. 2d 988 (S.D. Ohio 2003); *Miranda v. Michigan*, 141 F. Supp. 2d 747 (E.D. Mich. 2001)); and Comments of Securus Technologies, Inc. at 9-10 (Mar. 25, 2013) (citing, *inter alia*, *Arsberry v. Illinois*, 244 F.3d 558, 566 (7th Cir. 2001); *Ivey Walton, et al. v. New York State Dept. of Correctional Svcs.*, 921 N.E. 2d 145, 893 N.Y.S.2d 453, 485 (N.Y. Ct. App. 2009))).

²¹ “We reiterate that we will, however, continue to monitor the ICS market and will not hesitate to take additional action to prohibit site commissions, if necessary.” *Second Inmate Rate Order* ¶ 129.

reasonable regulation); *MD/DC/DE Broadcasters Ass’n v. FCC*, 236 F.3d 13, 18 (D.C. Cir. 2001) (reviewing challenge of reporting obligations in FCC Equal Opportunity as “arbitrary and capricious regulatory burden”). Video service provided by wireline common carriers, which include ICS providers, constitute video conference service for which the Commission refused to consider regulation in 2010 on the ground that it falls within the ambit of “information services.”²² Information services are excluded from the Commission’s Title II jurisdiction. *E.g.*, *Comcast v. FCC*, 600 F.3d 642, 659-660 (D.C. Cir. 2010) (vacating BitTorrent Order). The FCC offered no explanation whatsoever of its departure from this precedent, which alone is enough to make its action arbitrary and capricious. *FCC v. Fox Television Stations, Inc.*, 550 U.S. 502, 515 (2009) (“An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”)

In addition, the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* (“APA”), requires that “[g]eneral notice of proposed rule making shall be published in the Federal Register,” and such notice shall include “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”²³ 5 U.S.C. § 553(b). According to the Court of Appeals for

²² The focus of this proceeding is limited to the classification of broadband Internet service. We remain cognizant that, under the Act, all information services are provided “via telecommunications,” and therefore the use of telecommunications does not, on its own, warrant the identification of a separate telecommunications service component. For example, we do not intend to address in this proceeding the classification of information services such as e-mail hosting, web-based content and applications, voicemail, interactive menu services, **video conferencing**, cloud computing, or any other offering aside from broadband Internet service.

GN Docket No. 10-127, *Framework for Broadband Internet Service*, Notice of Inquiry, 25 FCC Rcd. 7866, 7909-10 ¶ 107 (2010) (emphasis added).

²³ 5 U.S.C. § 553(b).

the D.C. Circuit, “sufficient notice ... affords interested parties a reasonable opportunity to participate in the rulemaking process.” *Forester v. Cons. Prod. Safety Comm’n*, 559 F.2d 774, 787 (D.C. Cir. 1977).

Nothing in the Second Further Notice of Proposed Rulemaking, from which *the Second Inmate Rate Order* issued, indicated that existing video services were a target of the new rules. Rather, video services were discussed in the context of the hearing impaired: the Commission noted that advocated “decry correctional facilities’ ... failure to make newer equipment technology [*sic*] such as videophones for Video Relay Service (VRS) and point-to-point video communications[.]”²⁴ The Commission also benignly sought comment on what kinds of advances services are now available for the inmate market: “What kinds of services are available? ... What is the demand for these services and what rates are charged?”²⁵ Securus responded by noting that it has installed video visitation service at many correctional facilities, but questioned whether the FCC has authority to require companies to provide video service: “the FCC cannot force a jail to make even telephones available to inmates. Choice of ICS technology, particularly choices made for security reasons, is more squarely within the discretion of correctional authorities.”²⁶

The Second FNPRM did not give Securus any cause to believe that reporting requirements would be imposed on video visitation services. The FCC has again failed the APA notice requirement, and the video-services portion of Rule 64.6060 is likely to be reversed on that ground.

²⁴ Second FNPRM ¶ 141.

²⁵ *Second FNPRM* ¶ 148.

²⁶ WC Docket No. 12-375, Reply Comments of Securus Technologies, Inc. at 23 (Jan. 25, 2015).

The Commission cannot regulate Securus’s video visitation service, and that includes this attempt to impose a reporting requirement in Rule 64.6060(a)(4). The Commission’s inclusion of video services in Rule 64.6060 was thus extrajurisdictional, as well as a surprise, and is likely to be reversed on appeal. A stay of that portion of Rule 64.6060 is therefore warranted under *Virginia Petroleum Jobbers*.

II. SECURUS WILL SUFFER IMMEDIATE, IRREPARABLE HARM ABSENT A STAY

As the foregoing discussions make clear, Securus is likely to prevail on the merits of its partial appeal, a factor that strongly weighs in favor of granting the requested stay.²⁷ Securus also amply satisfies the second prong of *Virginia Petroleum Jobbers*, because it will suffer irreparable harm if the *Second Inmate Rate Order* becomes effective.

Irreparable harm, according to the D.C. Circuit, “must be both certain and great; it must be actual and not theoretical.” *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). It includes unrecoverable financial losses as well as recoverable losses that “threaten[] the very existence of the movant’s business.” 758 F.2d at 674. Courts also have found irreparable harm where an agency’s actions would require discontinuance of the affected services. *Penn Central Co. v. Pub. Utils. Comm’n of Connecticut*, 296 F. Supp. 893, 898 (D. Conn. 1969) (enjoining order of Connecticut PUC entered against railroad company).

Securus will suffer the following harms if the *Second Inmate Rate Order* becomes effective: (1) it will be unable to continue offering premium, optional calling service like Text2Connect and PayNow due to the caps imposed by Rule 64.6020(b) and the related restrictions imposed by Rules 64.6080 and 64.6090; (2) it will be unable to offer online, real-time credit card transactions to pay amounts due or fund accounts in advance due to the caps

²⁷ *Charter Commc’ns*, 22 FCC Rcd. at 13892 ¶ 4.

imposed by Rule 64.6020(b); and (3) it will be required to report every task or installation it undertakes at each of the 2100+ jails it serves, Smith Aff. ¶ 4, or face regulatory sanction under Rule 64.6060 due to the vague and overbroad definition of “Site Commission”.

A. Securus Could Not Allow Online Credit Card Processing Under the New Caps

As the Smith Affidavit and Boyd Affidavit demonstrate, Securus cannot continue to enable consumers to conduct online credit card transactions under the new \$3.00 ancillary fee cap. According to Geoff Boyd, CFO of Securus, “[t]he impact to Securus of implementing the new caps for online credit card funding transactions is an approximate **CONFIDENTIAL** ** million annual reduction in our EBITDA (Earnings Before Interest, Taxes, Depreciation, and Amortization).” Boyd Aff. ¶ 5 (Public Version). This loss encompasses “significant costs to enable consumers to pay bills and fund accounts with a credit card as summarized by the Declaration of Dennis Rose dated January 9, 2015, which was filed with the FCC.” Boyd Aff. ¶ 5.

With the per-transaction cost figures that Securus provided to the Commission in its January 2015 Comments and reiterates in Section I.A. above, “**Securus would lose several dollars per transaction under the new financial transaction fee caps.**” Smith Aff. ¶ 5 (emphasis in original). The substantial and unrecoverable losses that the new Ancillary Charge caps will create may force Securus to stop permitting online credit card transactions. Smith Aff. ¶ 7. In that case, “the FCC would have set the industry back to the days when payment could be made only by check or money order.” Smith Aff. ¶ 7.

The Hobson’s Choice that faces Securus – lose several dollars on every online transaction or stop enabling them altogether – amply satisfies the “irreparable harm” prong of *Virginia Petroleum Jobbers*. The financial losses are in the tens of millions of dollars, and they not

recoverable. The alternative is detrimental not only to Securus but, as further explained below, to the public. This showing of harm fully meets the *Virginia Petroleum Jobbers* test, warranting a stay.

B. Securus Would Have to Discontinue Text2Connect and PayNow Under the New Caps

As summarized above, the FCC has capped the rates for optional, premium calling service – “Single-Call Services” – such that ICS providers can pass through “the exact transaction fee charged by the third-party provider, with no markup, plus the adopted, per-minute rate.” Rule 64.6020. Securus cannot continue to provide Text2Connect or PayNow under those caps. Smith Aff. ¶ 7.

Securus has made a substantial investment in Text2Connect and PayNow. Geoff Boyd states that “Securus has spent well in excess of **CONFIDENTIAL**** ** million to be able to offer these optional convenience features.” Boyd Aff. ¶ 6 (Public Version). Under the new “Single-Call Services” rate cap, Securus will suffer “an approximate **CONFIDENTIAL** ** ** million annual reduction in our EBITDA.” Boyd Aff. ¶ 6 (Public Version).

Text2Connect and PayNow are valuable additions to the Securus panoply of services. As Securus explained in October 2014, “Text2Connect is offered as a way for inmates to call wireless phones collect; PayNow provides a way for an inmate to call a landline phone whose owner does not have an account with Securus – it allows immediate collect calling without the inmate having to wait for the called party to set up an account.”²⁸ Further, they are “*optional*” conveniences offered to customers. These options are not intended as permanent methods for inmates to make collect calls.”²⁹ Text2Connect, being a means to reach wireless phones, is

²⁸ Securus October 6, 2014 Letter at 5.

²⁹ Securus October 6 Letter at 5 (emphasis in original).

“becoming a more vital component of Securus’s service as more and more people abandon landline telephones.”³⁰ Again, as stated above, both of these products require affirmative, informed consent by the called party as to accepting the inmate’s call and accepting the charges. DeHoyos Aff. ¶ 4.

C. The Financial Loss Securus Will Incur Under the New Rules May Prevent It From Complying With Covenants To Its Banks

The total loss that Securus faces under the new Credit Card Processing and Single-Call Services caps is, according to CFO Geoff Boyd, “an approximate **CONFIDENTIAL ** **** Million annual reduction in EBITDA.” Boyd Aff. ¶ 8. That figure represents “approximately **CONFIDENTIAL ** **** of Securus’s expected 2015 EBITDA.” Boyd Aff. ¶ 8.

The tremendous, unrecoverable financial losses that the new Ancillary Charge and Single-Call Services caps will bring to Securus actually threaten the sustainability of its business. As Mr. Smith states, “I am concerned that Securus will not be able to service its debt and could be in default of certain covenants with its banks.” Where a movant’s very business is in jeopardy, the D.C. Circuit will find irreparable harm even if, *unlike here*, the financial loss could be recouped. *Wisconsin Gas Co.*, 758 F.2d at 674. The gravity of the harm that Securus faces weighs strongly in favor of a stay of these new caps.

D. Securus Would Face a Significant Regulatory Burden Under Rule 64.6060 as Well as Sanctions for Innocent Non-Compliance

The overbreadth and vagueness of Rule 64.6060, demonstrated in Sections I.C. and I.D. above, require that the rule be stayed pending appeal. The definition of “Site Commission” is so implausibly broad that Securus cannot fathom how to apply it, and thus Securus has a reasonable concern that whatever it files in its April 1 annual report will be somehow incorrect and subject

³⁰ Securus January 2015 Comments at 27.

to sanction. Where a regulation engenders “innocent noncompliance,” it imposes an unreasonable burden and should not be enforced. *See U.S. v. Locke*, 529 U.S. 89, 116 (2000) (remanding regulations governing oil spills promulgated by State of Washington Office of Marine Safety).

The regulatory burden and significant confusion that Rule 64.6060 imposes with regard to “Site Commission” reporting present a high risk of harm to Securus and therefore should be stayed.

III. THIRD PARTIES WILL NOT BE HARMED BY A STAY

With regard to the third prong of *Virginia Petroleum Jobbers*, the Wright Petitioners and other consumers of ICS will not be materially harmed by the partial stay of the *Second Inmate Rate Order* which Securus requests. In fact, consumers will benefit from a stay, because Securus would not be forced to discontinue to innovative, convenient services on which consumers have relied.

With respect to premium calling services, as well as ancillary service charges, it is important to reiterate that these services are *optional*. Customers who do not want to fund their accounts using a credit card or debit card may, for example, do so by check or money order. Customers who do not want to pay the premium fee for calls billed to their mobile phone account do not have to accept those calls. Therefore, no third party would suffer any meaningful harm if Securus is allowed to continue offering these optional services during the pendency of a stay.

Likewise, no party would be harmed by a stay of the overbroad reporting requirement for site commissions or the *ultra vires* reporting requirement for video visitation service. Although these rules have immediately negative consequences for those who must comply with them, there

are no present offsetting benefits to anyone else, because the FCC only intends to use the information it gathers for future rulemaking ventures (or enforcement actions).

IV. THE PUBLIC INTEREST FAVORS A STAY

Finally, a stay will satisfy the fourth prong of *Virginia Petroleum Jobbers*, because the public interest will be gravely impaired if the portions of the *Second Inmate Rate Order* challenged herein become effective.

The public would be harmed if this Petition were denied, because Securus would be forced to remove services from the market. As explained in Section II. above, the *Second Inmate Rate Order* will force Securus to cease providing Text2Connect, PayNow, and most credit card transactions or incur significant, unrecoverable financial losses.

Cessation of service due to below-cost rate caps is plainly a detriment to the public. In *Virginia Petroleum Jobbers*, the D.C. Circuit noted that “preserving the economic viability of existing public services” is a public good that can warrant a stay of an agency order. 259 F.2d at 925. Here, allowing the credit card caps – particularly the \$3.00 for online transactions – to become effective may well destroy the “economic viability” of these financial services and require their removal. The high risk that Securus must cease enabling online credit card transactions surely disserves the public good. The better course, in keeping with *Virginia Petroleum Jobbers*, is to stay the credit card transaction rates in order that Securus customers can continue to make these transactions while Securus seeks review on the merits.

The public would be doubly harmed if the Single-Call Services caps are not stayed. Mr. Smith, CEO of Securus, describes the value of Text2Connect and PayNow even further in his Affidavit. In a word, these services “keep people safe.” Smith Aff. ¶ 8. They also avoid needlessly extended pretrial detainment, because “[t]hey help people bond out of jail much

sooner, they enable arrestees to get legal advice quickly.” Smith Aff. ¶ 8. In addition, Text2Connect and PayNow “can literally be the difference between life and death for some arrestees, who may be desperate and despondent at being cast into the dangerous and unfamiliar environment of a jail.” Smith Aff. ¶ 10. Securus “**provides millions of these Text2Connect and PayNow calls each year.**” Smith Aff. ¶ 8 (emphasis in original).

Securus’s commitment to providing these valuable services cannot be overstated: it invested “over ** **CONFIDENTIAL** ** Million in these products.” Boyd Aff. ¶ 7. But at the unreasonable caps that the Commission has adopted in Rule 64.6020, “Securus will be forced to stop providing these valuable services, and millions of inmates and detainees will lose the ability to connect to immediate lifelines.” Smith Aff. ¶ 9. Again, the cessation of service is a recognize detriment to the public interest, *Virginia Petroleum Jobbers*, 259 F.2d at 925, particularly with regard to these innovative, vital services. The Commission would therefore serve the public interest by staying the Single-Call Services rates in Rule 64.6020.

CONCLUSION

For all these reasons, the Commission should stay these portions of the Second Report and Order until the forthcoming appeal from that order is resolved:

- Definition of “Site Commission” in Rule 64.6000;
- Fee caps on credit card processing and “Single-Call Service” in Rule 64.2020;
- Reporting requirements in Rule 64.6060 as they relate to Site Commissions and video-based services.
- Per-Call and Per-Connection Charges in Rule 64.6080;
- Flat-Rate Calling in Rule 64.6090; and
- Minimum and Maximum Account Balances in Rule 64.6100.

Securus respectfully requests that this Petition be resolved by **January 15, 2016**.

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Counsel to Securus Technologies, Inc.

Dated: December 22, 2015

CERTIFICATE OF SERVICE

I hereby certify on this 22nd day of December, 2015, that the foregoing Petition for Partial Stay of Second Report and Order Pending Appeal (FCC 15-136) (PUBLIC VERSION) was served via electronic mail on the following persons:

Chairman Tom Wheeler
Federal Communications Commission
Tom.Wheeler@fcc.gov

Commissioner Mignon Clyburn
Federal Communications Commission
Mignon.Clyburn@fcc.gov

Commissioner Jessica Rosenworcel
Federal Communications Commission
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By: s/Stephanie A. Joyce
Stephanie A. Joyce

ATTACHMENTS

**Before the
Federal Communications Commission
Washington, D.C. 20554**

Rates for Interstate Inmate Calling Services

WC Docket No. 12-375

AFFIDAVIT OF RICHARD SMITH (PUBLIC VERSION)

I, Richard Smith, hereby affirm under penalty of perjury and pursuant to 18 U.S.C. § 1621, that

1. I am the Chief Executive Officer of Securus Technologies, Inc. ("Securus") with headquarters at 14651 Dallas Parkway, Sixth Floor, Dallas, TX 75254.
2. I am providing this Affidavit in support of the Petition for Partial Stay seeking immediate relief from the *Second Inmate Rate Order* of the FCC. I have personal knowledge of the facts stated herein and could testify to the same.
3. I have been CEO of Securus since June 2008. I have been an executive officer in the telecommunications industry since 1985, most recently as CEO of Eschelon Telecom, which was acquired by Integra Telecom in August 2007.
4. Securus provides services exclusively to correctional facilities. As Securus has told the FCC, it presently serves approximately 2,100 correctional facilities in 43 states and the District of Columbia. It holds approximately 1,100 service contracts with state, county, and city governments.
5. **CREDIT CARD PROCESSING FEES** – The caps that the FCC has adopted for financial transaction fees are below Securus's costs, and Securus put evidence in the record on that point. Specifically, for credit card transactions, Securus must pay a third-party vendor up to **CONFIDENTIAL ** \$ **** for every transaction. In addition, Securus must recover internal processing costs of **CONFIDENTIAL **\$ **** per transaction plus **CONFIDENTIAL **\$ **** per transaction to cover the costs of bad debt and credit card fraud. These costs are far higher than the \$3.00 (online transaction) and \$5.95 (live agent transaction) that the FCC will allow us to charge. **Securus would lose several dollars per transaction under the new financial transaction fee caps.**
6. If the FCC rules are put into effect pending appeal, and later vacated, Securus will have no way to recover the revenues it will lose as a result of complying with the FCC-mandated rate caps.
7. Securus therefore is faced with a terrible choice: incur tremendous financial loss that never can be recovered; or stop allowing payment by credit card, meaning that the FCC

would have set the industry back to the days when payment could be made only by check or money order. In the latter case, many customers would be harmed, because they would have to wait several days for their payments to be credited to their accounts, and would be unable to receive telephone calls from inmates during that period, whereas at present Securus is able to credit their accounts immediately upon receipt of an online credit card payment.

8. **OPTIONAL, PREMIUM CALLING SERVICES (“SINGLE-CALL SERVICES”)** – Securus also must pay a third-party vendor to provide the optional, premium calling services called Text2Connect and PayNow. Text2Connect and PayNow are extremely valuable services that help people connect immediately to their attorneys and families – Text2Connect and PayNow keep people safe. They help people bond out of jail much sooner, they enable arrestees to get legal advice quickly. In addition, Text2Connect and PayNow help protect inmates and detainees from violence, because incidents can be reported to families and attorneys right away. **Securus provides millions of these Text2Connect and PayNow calls each year.**
9. Under the new rates and rules for “Single-Call Service,” Securus will be forced to stop providing these valuable services, and millions of inmates and detainees will lose the ability to connect to immediate lifelines.
10. Often, when an individual is arrested and first taken to jail, their most urgent need is to communicate with a family member or close friend. It can take several days for those parties to set up a new account with a provider like Securus, but PayNow and Text2Connect allow those parties to receive calls instantly. This can literally be the difference between life and death for some arrestees, who may be desperate and despondent at being cast into the dangerous and unfamiliar environment of a jail. And even in less desperate cases, the loss of freedom for a day or two, if a communications delay results in a delay in posting bail, is an irreparable and incalculable loss.
11. The new rules only allow Securus to pass through the vendor’s fee without any markup, and then Securus can only apply the per-minute calling rate that the FCC adopted. Securus will suffer significant financial losses, which it cannot later recoup, in providing Text2Connect or PayNow under these restrictions.
12. Securus again faces a terrible choice due to the new caps: unrecoverable financial losses or removing Text2Connect and PayNow from its service offerings.
13. The Declaration of Geoff Boyd, Chief Financial Officer of Securus, sets out the amount of financial losses that Securus would suffer if the new rates and rules became effective. Having seen those numbers, I am concerned that Securus will not be able to service its debt and could be in default of certain covenants with its banks.

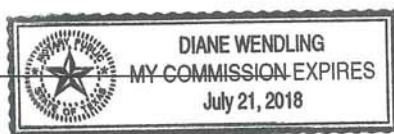
I affirm that the foregoing is true and correct to the best of my knowledge.


Richard A. Smith

SUBSCRIBED TO AND SWORN BEFORE ME this 21st day of December, 2015.


NOTARY PUBLIC

My Commission expires: _____



**Before the
Federal Communications Commission
Washington, D.C. 20554**

Rates for Interstate Inmate Calling Services

WC Docket No. 12-375

AFFIDAVIT OF GEOFF BOYD (PUBLIC VERSION)

I, Geoffrey M. Boyd, hereby affirm under penalty of perjury and pursuant to 18 U.S.C. § 1621, that

1. I am the Chief Financial Officer of Securus Technologies, Inc. (“Securus”) with headquarters at 14651 Dallas Parkway, Sixth Floor, Dallas, TX 75254.
2. I am providing this Affidavit in support of the Petition for Stay of the Second Report and Order. I have personal knowledge of the facts stated herein and could testify to the same.
3. I have been Chief Financial Officer of Securus since September of 2013 and have over 14 years of experience in telecommunications including ten years as a Chief Financial Officer. From 2000 to 2007, I was Chief Financial Officer of Eschelon Telecom, Inc., and prior to that I was the Director of Strategic Planning for Dobson Communications, one of the largest rural wireless (mobile phone) providers in the country prior to its sale to AT&T.
4. I have reviewed the new rates and rules regarding credit card processing and “Single-Call Services” contained in the Second Report and Order. This Declaration sets forth the serious, unrecoverable financial losses that Securus would suffer under those new rates and rules.

CREDIT CARD PROCESSING

5. Securus incurs significant costs to enable consumers to pay bills and fund accounts with a credit card as summarized by the Declaration of Dennis Rose dated January 9, 2015, which was filed with the FCC. The impact to Securus of implementing the new caps for online credit card funding transactions is an approximate **CONFIDENTIAL** ** \$ ** million annual reduction in our EBITDA (Earnings Before Interest, Taxes, Depreciation, and Amortization).

“SINGLE-CALL SERVICES”

6. Securus provides Text2Connect and PayNow as also summarized in the Declaration by Dennis Rose. As of this date, Securus has spent well in excess of \$ million to be able

to offer these optional convenience features. The impact to Securus of implementing the new caps for single call services is an approximate **CONFIDENTIAL** ** [REDACTED] ** million annual reduction in our EBITDA .

7. In addition, our investment of over **CONFIDENTIAL** ** [REDACTED] ** million in these products will have been either lost or severely impaired.

**FINANCIAL IMPACT OF NEW CAPS FOR
CREDIT CARD PROCESSING AND SINGLE-CALL SERVICES**

8. All totaled, the impact of implementing the new rates results in an approximate **CONFIDENTIAL** ** [REDACTED] ** Million annual reduction in EBITDA, in addition to the loss of most or all of its initial investment that was in excess of \$20 million. That annual EBITDA loss represents approximately **CONFIDENTIAL** ** [REDACTED] ** of Securus's expected 2015 EBITDA.
9. I emphasize that the reductions stated above are of earnings *before interest*. Securus obtains a significant portion of its financing through bank loans, and the amount of interest it will have to pay on those loans will not be reduced in proportion to the reduction in earnings.

I affirm that the foregoing is true and correct to the best of my knowledge.

Dated: December 18, 2015



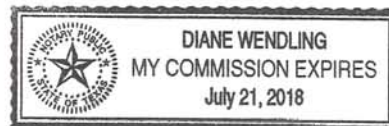
Geoffrey M. Boyd
Chief Financial Officer
Securus Technologies, Inc.

SUBSCRIBED TO AND SWORN BEFORE ME this 18th day of December, 2015.



NOTARY PUBLIC

My Commission expires: July 21, 2018



**Before the
Federal Communications Commission
Washington, D.C. 20554**

Rates for Interstate Inmate Calling Services

WC Docket No. 12-375

AFFIDAVIT OF DANNY DEHOYOS

I, Danny DeHoyos, hereby affirm under penalty of perjury and pursuant to 18 U.S.C. § 1621, that

1. I am Senior Vice President – Operations of Securus Technologies, Inc. (“Securus”) with headquarters at 14651 Dallas Parkway, Sixth Floor, Dallas, TX 75254. I have been Senior Vice President – Operations since September 2015. I joined Securus in September 2008, as Vice President – Service and Technical Operations.
2. I am providing this Affidavit in support of the Petition for Stay of the Second Report and Order. I have personal knowledge of the facts stated herein and could testify to the same.
3. Specifically, this Affidavit sets out the audible prompts and instructions that a consumer hears when they receive an inmate call that is made via Text2Connect or PayNow.
4. When an inmate makes a phone call using Text2Connect, the called party hears several instructions, including:
 - “Hello, you are receiving a call from <inmate name recorded in their voice> an inmate from <facility name>.”
 - “Press 1 to consent to the delivery of a pre-recorded message with information how you can arrange to receive calls from your incarcerated loved one. Press 2 or hang up to terminate this call.”
 - “If you would like to continue this call of up to <effective call duration for PayNow> by accepting a charge to your mobile telephone bill of fourteen dollars and ninety-nine cents, please press one.”
 - “If you would like to continue this call of up to <effective call duration for Text2Connect> by accepting a charge to your mobile telephone bill of nine dollars and ninety-nine cents, please press two.”
 - “If you would like to set up or add funds to a prepaid AdvanceConnect account in order to pay for future calls, please press three.”

5. If the called party chooses option three in the call flow, he or she will be transferred to the Securus Correctional Billing Service to create an account. The individual is instructed that he or she may fund the newly created account via debit card, credit card or send in a check. He or she also is informed that funding via check is a free option and there is no fee.
6. It is worth noting that we process millions of calls via Text2Connect and PayNow and we have received no complaints. Customers have been very satisfied with both of these optional products.

I affirm that the foregoing is true and correct to the best of my knowledge.

Dated: December 22, 2015



Danny DeHoyos
Senior Vice President – Operations
Securus Technologies, Inc.

SUBSCRIBED TO AND SWORN BEFORE ME this 22nd day of December, 2015.



NOTARY PUBLIC



My Commission expires: July 14, 2019